

# State of New Hampshire



## PERSONNEL APPEALS BOARD

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### APPEAL OF JOANNE GRUENER

Department of Safety - Division of Fire Standards and Training

Docket #96-T-3

August 21, 1996

The New Hampshire Personnel Appeals Board (Bennett and Rule) met on Wednesday, January 31, 1996, to hear *the* termination appeal of Joanne Gruener, a former probationary employee of the Department of Safety, Division of Fire Standards and Training. Ms. Gruener was represented at the hearing by SEA General Counsel Michael Reynolds. Clarence Bourassa, Esq., appeared on behalf of the Department of Safety.

Ms. Gruener testified that she was hired by the Department of Safety as a part-time employee on November 13, 1992, and was appointed to a full-time, probationary position of Executive Secretary at the Fire Training Academy on January 13, 1995. In May, 1995, Ms. Gruener's son broke his leg, and she was allowed to take unpaid leave from May 17, 1995 through May 21, 1995, so that she could be with him. The day after her son's release from the hospital, Ms. Gruener was injured in an automobile accident. At the appellant's request, she was granted an unpaid leave of absence effective May 22, 1995. She did not receive notice that the leave would expire on August 18, 1995.

On June 6, 1995, Susan Beaudoin, Administrative Secretary at Fire Standards and Training, asked Ms. Gruener to complete a form certifying her serious medical condition under the provisions of the Family and Medical Leave Act. The form was returned to the Division of Fire Standards and Training the following day. Ms. Gruener did not request leave under the FMLA, nor did Ms. Beaudoin advise the appellant that the leave would be classified as such.

On June 28, 1995, the appellant's supervisor, Joseph Canoles, Director of the Division of Fire Standards and Training, wrote to Ms. Gruener informing her that he had received a June 23, 1995, note from her doctor which said that Ms. Gruener would need to be out of work for at least six more weeks. He advised Ms. Gruener that the note was inadequate to support her continued absence. He informed her that in accordance with the Personnel Rules, she would be required to provide him with a written assessment from her physician detailing her general state of health and the specific nature of any relevant injury, illness, disability or condition that might affect her ability to perform all the duties required by her position. Both the employer and the employee discussed her leave in terms of compliance with the Rules of the Division of Personnel.

On August 4, 1995, Joseph Canoles, Director of the Division of Fire Standards and Training, made a written request to Claude Ouellette, Department of Safety Human Resources Administrator, for permission to temporarily fill Ms. Gruener's position. His memo stated that Ms. Gruener had been out of work since May 17, 1995, and that it appeared from a July 21, 1995, letter from her doctor that she would be out at least through August, and then still might be unable to return to work. His memo concluded, "I am requesting that we fill this position, on a temporary, full-time basis until Joanne is able to return to work." He forwarded a copy of that memorandum to Ms. Gruener on August 7, 1995. He added a handwritten note which said, "In order to avoid any misunderstandings I am sending you a copy of memo that I have sent to business office. If you have any questions please call."

On August 28, 1995, Ms. Gruener telephoned Mr. Canoles to advise him that her treating practitioner would not release her to return to work for at least two more weeks, and that she would need additional leave without pay. During that conversation, as in all her previous conversations with the Division of Fire Standards and Training, she was assured that her job was not in jeopardy. Mr. Canoles did not inform Ms. Gruener that her 3-month leave of absence had expired on August 18, 1995. Ms. Gruener followed her verbal request with a written request for additional unpaid sick leave on August 29, 1995.

Approximately two weeks later, on September 11, 1995, Ms. Gruener again telephoned Mr. Canoles to request additional leave. She followed that request with a written request dated September 12, 1995, stating that she would be unable to return to work until November 1, 1995. Her letter said, in part, "At the present time I cannot return to work until November 1, 1995 under Doctor Saggiotes' orders. I will continue to keep you advised, and look forward to hearing from you as to whether this additional time off is acceptable to you."

On September 13, 1995, Mr. Canoles wrote to Mr. Ouellette at the Department of Safety, telling him that he had spoken with Ms. Gruener on September 11, 1995, and had received a letter from her dated September 12, 1995, requesting additional time off, without pay, until November 1, 1995. He said he was aware that at some point she had submitted paperwork to the business office requesting to be placed on FMLA leave, which he believed had expired on August 18, 1995. He said that her lengthy absence had created difficulties for his division. He asked for assistance in filling Ms. Gruener's position on a permanent basis. Attached to the memorandum was a summary of his communication with Ms. Gruener and her treating practitioners.

On September 15, 1995, Mr. Ouellette wrote to Ms. Gruener informing her that the Department of Safety needed to fill her position with a permanent employee, saying it was unfair to deny the temporary employee permanent status any longer. He assured Ms. Gruener of the Department's best wishes, and invited her to reapply for a position at the Department of Safety as soon as she was physically able to do so.

Claude Ouellette, Human Resources Administrator for the Department of Safety, testified that an appointing authority may grant an employee up to three months of leave without pay. Thereafter, additional unpaid leave must be approved by the Governor and Executive Council. He said that Ms. Gruener had been on leave because of her son's injury between May 17 and May 21, 1995, and that she was granted additional leave without pay beginning on n May 22, 1995, to allow her to recuperate from injuries she sustained in an automobile accident that day. He testified that her leave expired on August 18, 1995.

Mr. Ouellette testified that Commissioner Flynn denied Ms. Gruener's request for additional leave, and that she was therefore absent without approved leave on August 19, 1995. Mr. Ouellette also testified that he had reclassified Ms. Gruener's leave as FMLA leave, and that her entitlement to twelve weeks of leave under the FMLA had also expired on August 18, 1995. He testified that no one from the Department of Safety had met with Ms. Gruener prior to her termination, since she was extremely upset, but fully aware that she was being separated from service. He admitted that she was not advised of her right to appeal the termination.

Joseph Canoles, Director of the Division of Fire Standards and Training, testified that Ms. Gruener had been in touch with him a number of times throughout her absence. He said that as a single parent, Ms. Gruener was obviously concerned about being able to return to her job after she had recovered from her injuries. He testified that he felt it was best to reassure her that she didn't need to worry about her job and instead should concentrate on getting well. Mr. Canoles testified that he had not given Ms. Gruener notice that there was a specific end date to her leave, or that absence beyond that date would be considered unauthorized leave.

Mr. Reynolds argued that Ms. Gruener's termination was both arbitrary and capricious. He argued that Ms. Gruener had received no notice of the reasons for her termination and was never apprised of her rights to appeal the termination to the Personnel Appeals Board. Mr. Reynolds argued that the department failed to provide the appellant with information concerning her leave, and having failed to notify her in writing that her leave had been classified as FMLA leave, the appellant was entitled to another twelve weeks of leave at the expiration of the original three month leave of absence granted under the provisions of the Personnel Rules.

Mr. Bourassa admitted that there were technical violations in the manner in which the Department terminated Ms. Gruener's employment, but he argued that those violations were harmless. Mr. Bourassa argued that the Division of Fire Standards and Training granted Ms. Gruener a three month, unpaid leave until August 18, 1995, under the authority of Per 1205.02 of the Rules of the Division of Personnel, and asserted that her three month leave of absence ran concurrently with her entitlement to leave under the Family and Medical Leave Act. Mr. Bourassa argued that after

granting Ms. Gruener leave under Per 1205.02 (a), no further leave could have been granted without approval of Governor and Council. However, he noted that the appointing authority was under no obligation to make such request.

Mr. Bourassa argued that Per 1205.02 (d) permits an appointing authority to dismiss an employee who fails to report promptly at the expiration of a leave of absence. He also argued that Per 202.04 (f) of the Rules of the Division of Personnel classifies the refusal of an appointing authority to grant a leave of absence without pay as an invalid basis of appeal. He asked the Board to find that the Department of Safety was authorized to dismiss Ms. Gruener from her employment as a full-time probationary employee for failing to report promptly at the conclusion of an approved leave.

#### Findings of Fact

1. Ms. Gruenes was a probationary employee at the time of her termination from employment.
2. As the result of a non-work related accident, Ms. Gruener was placed on unpaid medical leave effective May 22, 1995.
3. Ms. Gruener would not have been able to return to work full-time prior to November 6, 1995.
4. Throughout the period of her absence, Ms. Gruener complied with the requirements of the Rules of the Division of Personnel in requesting unpaid leave for the period of her recuperation.
5. Throughout the period of absence, Ms. Gruener complied with all of the employer's requests for information and medical documentation.
6. At the request of her employer, Ms. Gruener provided a certification of a serious medical condition, which employees are required to have completed in order to receive approval for leave under the provisions of the Family and Medical Leave Act.
7. Ms. Gruener never requested leave under the FMLA, nor was she advised, either orally or in writing, that her leave had been classified as FMLA leave and would run concurrently with her leave approved under Per 1205.02 of the Rules of the Division of Personnel.
8. In his discussions with Ms. Gruener on August 28, 1995, and September 11, 1995, Mr. Canoles did not inform the appellant that her leave had expired on August 18, 1995. Instead, he told her not to worry about her job, and to concentrate on her recuperation.

9. Ms. Gruener was never directed to return to work, or face possible dismissal for failure to report promptly at the conclusion of an approved leave as provided by Per 1205.02 (d) of the Rules.
10. Ms. Gruener received notice by letter dated September 15, 1995, signed by Human Resources Administrator Claude Ouellette, that because of Ms. Gruener's lengthy absence and the poor prognosis for recovery from her injuries, the Department needed to fill her position on a permanent basis as quickly as possible.
11. Ms. Gruener was not informed of the effective date of her termination from employment, nor was she advised that under the provisions of Per 1001.02 (c) of the Rules of the Division of Personnel, she could appeal her termination from employment.

### Rulings of Law

1. Per 1001.02 (a) provides, "At any time during the initial probationary period an appointing authority may dismiss an employee who fails to meet the work standard provided the dismissal is not arbitrary, illegal, capricious, or made in bad faith."
2. Per 1001.02 (b) provides, "No appointing authority shall dismiss a probationary employee under this rule until the appointing authority...Meets with the employee, prior to issuing the notice of dismissal, to discuss the appointing authority's reason(s) supporting the decision to dismiss the employee..."
3. Per 1001.02(c) provides, "If an appointing authority determines that there are sufficient grounds to dismiss the probationary employee, the appointing authority shall: Prepare a written notice of dismissal to be given to the probationary employee specifying the reason(s) for dismissal; Notify the employee in writing that the employee may appeal the dismissal within 15 calendar days of the notice of dismissal to the personnel appeals board if the employee can allege facts sufficient on their face to support an allegation that the dismissal was arbitrary, illegal, capricious, or made in bad faith; forward a copy of the written notice of dismissal to the director [of personnel]."
4. Per 1205.02 (e) of the Rules of the Division of Personnel provides that, "Failure on the part of an employee to report promptly at the expiration of the leave of absence shall be a cause for termination."

## Decision and Order

On all the facts in evidence, the Board found that although the Department of Safety may have had sufficient grounds to terminate Ms. Gruener's employment, it failed to comply in any meaningful way with the Rules of the Division of Personnel for the removal of an employee, whether permanent or probationary, who was medically unable to return to work at the conclusion of an approved leave. The record reflects that Ms. Gruener complied with all of her employer's requests for information about her medical status and her ability to return to work. Ms. Gruener fulfilled her obligations for requesting leave, but was never informed by her employer when her approved leave would terminate, or that any absence beyond that date would be considered unauthorized, unapproved leave. Ms. Gruener fulfilled her obligations for certification of a serious medical condition as described by the FMLA, but never requested leave under the FMLA. Her employer never informed her that her leave, with or without her request, would be classified as leave under the FMLA and would terminate at the conclusion of twelve weeks. Finally, when the employer reached the decision to terminate Ms. Gruener's employment, the employer failed to meet with the employee to discuss the reasons for termination, specify a basis for the termination, cite the rule or rules which authorized such termination, or advise the employee that she could appeal that termination.

The Board does not agree that the agency's technical violations associated with this termination were harmless. Ms. Gruener was assured throughout her absence that her job was not in jeopardy. In September, Ms. Gruener requested additional leave, but received no notification that her request had been denied. Ms. Gruener was notified by letter dated September 15, 1995, that another employee had been selected to fill her position on a permanent basis.

The Board found that the department's notice was sufficiently faulty to warrant the appellant's reinstatement. In so ruling, the Board understands that Ms. Gruener was a probationary employee who had completed less than five months of a twelve month probationary period at the time of her injury and subsequent absence. Further, while there is evidence that Ms. Gruener may have been able to return to work on a part-time basis on November 1, 1995, and may have been able to return to work on a full time basis five days later, there is insufficient evidence to conclude that she would

have been able to return to work full time on that date, or that she could have returned to work without restrictions, with or without reasonable accommodation.

The Board voted to order Ms. Gruener reinstated to her position of Executive Secretary, or a position of like salary and grade, where she shall be permitted to commence a new probationary period. Her reinstatement shall be made without benefit of back pay, accrual of leave, or seniority credit. Her reinstatement shall be made within thirty days of the date of this order, at a time which is mutually convenient to the parties.

THE PERSONNEL APPEALS BOARD

  
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Mark J. Bennett, Acting Chairman

  
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Lisa A. Rule, Commissioner

cc: Virginia A. Lamberton, Director of Personnel  
Clarence E. Bourassa, Esq., Department of Safety  
Michael C. Reynolds, SEA General Counsel